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COMMONWEALTH OF MASSACHUSETTS

HAMPDEN, SS.

SUPERIOR COURT DEPARTMENT
OF THE TRIAL COURT

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COMMONWEALTH OF MASSACHUSETTS

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v.

Docket No. HDCR2012-00043

AYYUB ABDUL-ALIM

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* * * * *

MOTION TO SUPPRESS
BEFORE THE HONORABLE JOHN S. FERRARA

APPEARANCES:

For the Commonwealth:

Hampden County District Attorney's Office
Hall of Justice
50 State Street
Springfield, Massachusetts 01102
By: Frank E. Flannery, Assistant District Attorney

For the Defendant:

1145 Main Street
Suite 403
Springfield, Massachusetts 01103
By: Thomas E. Robinson, Esq.

Springfield, Massachusetts
Criminal 1 - Courtroom 1
November 25, 2013

Barbara A. Reardon
Approved Court Transcriptionist

1 (Court in session at 11:22 a.m.)

2 (Defendant not present.)

3 THE COURT: Good morning, Attorney Flannery. As soon as
4 Attorney Robinson comes out, we'll address this.

5 CLERK DOLAHER: Go ahead.

6 MR. FLANNERY: Good morning, your Honor.

7 THE COURT: Good morning.

8 Good morning, Attorney Robinson.

9 MR. ROBINSON: Good morning, your Honor.

10 THE COURT: All right. Are we ready to proceed?

11 MR. FLANNERY: I believe so, your Honor.

12 THE COURT: Okay.

13 MR. ROBINSON: Your Honor, if I could just have a --

14 THE COURT: You could have Mr. --

15 MR. ROBINSON: -- moment.

16 COURT OFFICER: They're trying to, your Honor. It's going
17 to be a couple minutes.

18 THE COURT: All right.

19 MR. ROBINSON: Your Honor, I should report to the Court that
20 we had some difficulty obtaining the Internal Investigation Unit
21 report copies from the clerk's office, and I literally just have
22 handed that to Attorney Flannery just now, so he may need a
23 moment to review that. But perhaps we could start with Sowers
24 and then, after that, take a moment.

25 THE COURT: Well --

1 MR. FLANNERY: Your Honor --

2 THE COURT: -- what do you say, Attorney Flannery?

3 MR. FLANNERY: -- it's a little lengthier than I had
4 anticipated. It looks like about 25 pages.

5 THE COURT: All right.

6 MR. FLANNERY: And then there's another document that
7 he's --

8 MR. ROBINSON: That's something else. That's not --

9 THE COURT: All right. So you just received this. You've
10 had an opportunity to review it.. Why don't we bring Mr.
11 Abdul-Alim out.

12 (Defendant present.)

13 CLERK DOLAHER: For the record, your Honor, the defendant is
14 present before the Court.

15 THE COURT: All right. This may be just a moment.

16 That's all right, Mr. Abdul-Alim. So I'm advised by your
17 attorney, Mr. Robinson, that he received some documents that had
18 been requested and he's just provided copies to the Assistant
19 District Attorney, Attorney Flannery. And so we have two
20 possibilities here, either giving Attorney Flannery some time to
21 review those documents.

22 Did you contemplate that they might be used in the
23 cross-examination of Officer Sowers, Attorney Robinson?

24 MR. ROBINSON: It's possible in the event that he testifies
25 in a way that's inconsistent with his statements --

1 THE COURT: All right.

2 MR. ROBINSON: -- in the report.

3 THE COURT: All right. So, in light of that, I will give
4 you, Attorney Flannery, an opportunity to review the materials.
5 How long do you need?

6 MR. FLANNERY: Perhaps ten minutes.

7 THE COURT: All right. So we'll pass this and call it again
8 in about ten minutes time.

9 MR. FLANNERY: Thank you, your Honor.

10 MR. ROBINSON: Thank you.

11 THE COURT: Thank you.

12 (Hearing in recess at 11:25 a.m.)

13 (Hearing resumes at 11:47 a.m.)

14 (Defendant present.)

15 CLERK DOLAHER: Matter 9, matter of Ayyub Abdul-Alim, Docket
16 2012-43. This is for hearing on a motion to suppress before your
17 Honor. Attorneys Flannery and Robinson.

18 THE COURT: All right. So, when we left off, it was my
19 understanding that we had at least one more witness, that would
20 be Officer Sowers, and perhaps two if the defendant was going to
21 be testifying. Is that correct?

22 MR. ROBINSON: That's correct, your Honor.

23 THE COURT: All right. And are we ready to proceed?

24 And you're calling Officer Sowers, is that correct, Attorney
25 Flannery?

1 MR. FLANNERY: That's correct, your Honor.

2 THE COURT: All right. Why don't we proceed then.

3 MR. FLANNERY: The Commonwealth calls Anthony Sowers.

4 CLERK DOLAHER: Officer Sowers, if you could just stop and
5 raise your right hand, please.

6 (Witness sworn.)

7 THE WITNESS: I do.

8 CLERK DOLAHER: Thank you.

9 ANTHONY SOWERS, Sworn

10 DIRECT EXAMINATION

11 BY MR. FLANNERY:

12 Q Good morning.

13 A Good morning.

14 Q Could you please state your name?

15 A Anthony Sowers.

16 Q And can you tell us what you do for a living?

17 A I'm a Springfield police officer.

18 Q And how long have you been a police officer with the
19 Springfield Police Department?

20 A Six years.

21 Q And what shift do you typically work?

22 A Four to midnight.

23 Q Now, I want to draw your attention back to the evening of
24 December 9, 2011. Can you tell us if you were working on that
25 evening?

1 A I was.

2 Q And can you tell us at some point between seven and 7:30
3 that evening whether you were dispatched to the Getty gas station
4 on State Street?

5 A We were.

6 Q And can you tell us if somebody was -- it sounds like
7 someone was with you. Can you tell us who you were with?

8 A My partner for that night was Officer Berrios.

9 Q And were you dispatched there with any particular
10 instructions?

11 A We were. We were asked to identify the identity of a white
12 male operating a white Jeep in the area of the Getty gas station.

13 Q And do you know whether another officer was making this
14 request of you?

15 A Yes.

16 Q Which officer was that?

17 A Officer Ron Sheehan.

18 Q And was he speaking to you directly or was this being
19 relayed through the dispatch?

20 A Relayed through the dispatch.

21 Q Okay. So when you reached that location, can you tell us
22 what happened?

23 A We entered the parking lot of the Getty gas station,
24 observed the white Jeep that was occupied by a white male. We
25 began to ascertain his information.

1 Q All right. Let me just stop you there. Where was this
2 white Jeep?

3 A It was in the parking lot. I think it's 671 State Street.

4 Q And was it stopped?

5 A Yes.

6 Q And was the operator that you just referred to inside or
7 outside of the vehicle?

8 A I believe he was in the driver's seat.

9 Q And did you approach him on foot?

10 A We did.

11 Q Okay. And where was the cruiser -- your cruiser parked at
12 that point?

13 A I believe behind his vehicle.

14 Q Now, you indicated that you hadn't spoken to Officer Sheehan
15 directly, at least initially. At what point did you speak with
16 him or did you speak to him at some point during this encounter?

17 A As we were identifying the driver, Officer Sheehan told us
18 via Channel 8 on our radio that there was a subject with a red
19 jacket approaching us and that he had a firearm on him.

20 Q Okay. And I'm going to back up for just a moment.

21 You testified that you -- you and your partner approached
22 the operator of this white Jeep in the parking lot. Were those
23 your instructions, to identify the owner of that Jeep at that
24 location?

25 A Yes.

1 Q Okay. And at some point during this encounter you received
2 a direct communication from Officer Sheehan concerning another
3 individual?

4 A Correct.

5 Q And, again, if you could just tell us what happened with
6 respect to that communication?

7 A Officer Sheehan said the guy in the red jacket that was
8 approaching us had a firearm on him.

9 Q Okay. And was Officer Sheehan present? Or did you know
10 where he was, I should say?

11 A He was not present.

12 Q Okay. And at that point did you know -- did you have any
13 idea where he was?

14 A No.

15 Q And what did you do in response to that radio transmission?

16 A Officer Berrios and I observed a male with a red jacket
17 approaching us. We grabbed him. I placed him in handcuffs. We
18 detained him. I patted his outer garments for a weapon and
19 informed Officer Sheehan that at that time I did not feel a
20 firearm on his person.

21 Q Okay. Now, I just want to back up a little bit and go
22 through some of that in a little bit more detail, but I want to
23 start by asking you whether you see the person that you just
24 referred to as the person you stopped in the courtroom today?

25 A I do.

1 Q And could you point him out and perhaps mention an article
2 of clothing he's wearing?

3 A He has got a red tie on.

4 MR. FLANNERY: Your Honor, may the record reflect that the
5 witness has identified the defendant?

6 THE COURT: The record will reflect the identification of
7 the defendant.

8 BY MR. FLANNERY:

9 Q Now, you indicated that you placed the defendant in
10 handcuffs and then conducted a pat frisk. When you and Officer
11 Berrios first approached him before you handcuffed him, what did
12 you do?

13 A We both grabbed his arms and, for officer safety, of the
14 location, the fact that this guy we were told that has a firearm
15 on him, we -- I placed him in handcuffs.

16 Q Okay. Well, now, you say that you both grabbed his arms.
17 Did you both grab both his arms or were you on one or the other
18 side of him? Can you be more specific, if you recall, about
19 that?

20 A I believe I was on one side and my partner, Officer Berrios,
21 was on the other side. We each grabbed an arm. I took my
22 handcuffs out, put the handcuffs on him.

23 Q Now, you testified that you handcuffed him for officer
24 safety and you used that phrase a couple of times. Can you tell
25 us were you concerned for your safety at that point, given the

1 communication from Officer Sheehan?

2 A Yes, yeah. He said that this guy had a firearm. We weren't
3 going to take any chances, so I placed the handcuffs on him in
4 order for him to not be able to use that firearm against me or
5 anybody else.

6 Q Okay. So were you concerned for your safety at that point?

7 A Absolutely.

8 Q And --

9 CLERK FOULKS: Excuse me. Can you just keep your voice up?

10 THE WITNESS: Okay.

11 CLERK FOULKS: Thank you.

12 BY MR. FLANNERY:

13 Q Were you concerned for anyone else's safety?

14 A My partner's safety, anybody around in that location's
15 safety.

16 Q Now, you say that you grabbed him, you put the handcuffs on
17 him, and then you conducted a pat frisk?

18 A I did.

19 Q And where did that pat frisk occur?

20 A I believe it was next to our marked cruiser --

21 Q Okay.

22 A -- which was within a couple of feet of the guy, Mr.
23 Abdul-Alim, with the red jacket.

24 Q Okay. So did you walk him over to the cruiser?

25 A We did.

1 Q Was that before or after you handcuffed him, or do you
2 recall?

3 A I believe that was after I handcuffed him.

4 Q Okay. And tell us what happened when you conducted a pat
5 frisk.

6 A I patted down his outer garments, and at that time I did not
7 feel any hard object.

8 Q Okay. And what did you do immediately after that?

9 A I relayed this information to Officer Sheehan, and at that
10 point he informed us to check his underwear.

11 Q Okay. Now, when you say that you relayed this information
12 to him and then he responded, was this via radio?

13 A Yes.

14 Q And where is this radio?

15 A I believe I had it on my -- one of my shoulders.

16 Q Okay. And when someone is communicating to you via this
17 radio, is the sound coming out of a speaker?

18 A Correct.

19 Q Okay. And if somebody is nearby, can they hear that?

20 A Yes.

21 Q And as you were communicating with Officer Sheehan, where
22 were you in relation to the defendant?

23 A Within a couple of feet. So he told us -- he told me to
24 step away from him.

25 Q Okay. And you did that, and at that point did Officer

1 Sheehan tell you where to search more thoroughly?

2 A Yes.

3 Q And where was Officer Berrios as you were having this
4 communication with Officer Sheehan?

5 A Six -- six to ten feet, possibly, away from me.

6 Q Okay. Did he stay with the defendant?

7 A He did.

8 Q All right. And at this point was the defendant still -- was
9 he outside the cruiser?

10 A Yes.

11 Q And he was in handcuffs?

12 A Yes.

13 Q All right. So Officer Sheehan relayed this additional
14 message to you and information about where to search. What
15 happened next?

16 A I told Officer Berrios that the firearm was in his
17 underwear, and Officer Berrios then performed another pat frisk
18 of --

19 Q Okay. And did you observe this pat frisk?

20 A I did.

21 Q And did you observe it to be different in any way than the
22 one you had just conducted?

23 A No.

24 Q Okay. And did you observe whether Officer Berrios found
25 anything --

1 A He did.

2 Q -- during his pat frisk?

3 And did he tell you that or did he show you that? How did
4 you know he had found something?

5 A He told me.

6 Q And after he told you that he had found something, what did
7 you do?

8 A I informed Officer Sheehan that we recovered -- or we
9 located the firearm in his underwear.

10 Q And what did you do with respect to the defendant?

11 A At that point we walked him to the cruiser, placed him in
12 the cruiser. Officer Berrios then retrieved the firearm --

13 Q Okay.

14 A -- from his underwear.

15 Q So Officer -- did you observe Officer Berrios retrieving the
16 firearm?

17 A Yes, I did.

18 Q And so were you standing outside the cruiser?

19 A I was.

20 Q All right. And so was the defendant in the back seat of the
21 cruiser?

22 A Yes, he was.

23 Q And could you see where the firearm was retrieved from?

24 A Yes. From his underwear.

25 Q And do you recall what the firearm looked like?

1 A I believe it was silver, silverish. It was a .25 Colt.

2 Q And did you take possession of that or did Officer Berrios
3 hang onto it? What happened with the firearm?

4 A We then placed it in a -- I believe we placed it in a bag
5 and put it in the -- in our cruiser.

6 Q And do you recall whether it was loaded?

7 A It was.

8 Q And what did you do with respect to that once you checked it
9 to see if it was loaded?

10 A Well, we cleared the firearm. There was not a bullet in the
11 chamber. There was six rounds in the magazine.

12 Q All right. And so you -- did you unload -- did you take the
13 clip out?

14 A We did. We took the clip out and made it safe.

15 Q All right. Now, just in terms of time frame here -- and,
16 again, I'm just asking for sort of a ballpark estimate. From the
17 time that you first approached and essentially seized the
18 defendant by grabbing his arms to the time that the second pat
19 frisk by Officer Berrios took place, approximately how much time
20 are we talking about between those two points?

21 A Possibly a minute, two minutes.

22 Q And was there any time where nothing was happening, where
23 you were just waiting during that time period?

24 A No.

25 Q Now, I also want to ask you a few questions about the area

1 in which this all took place. You testified about your
2 experience as a police officer. Are you -- or at the time, back
3 in December of 2011, were you familiar with that area?

4 A Yes.

5 Q And can you tell us how you were familiar with it?

6 A I had been assigned to that area at that time for
7 approximately four years.

8 Q And at the time, back in December, 2011, were you aware of
9 reports of criminal activity or arrests, things of that nature,
10 that had occurred within, say, the last several months preceding
11 this investigation?

12 A Yes. We received several 911 calls in that area for a
13 variety of reasons, including people selling drugs, shots fired,
14 ShotSpotter activations, and so forth.

15 Q And you testified earlier about your concern for your safety
16 and Officer Berrios's safety and other people's safety. Did that
17 play a part, your knowledge of that area, did that play a part in
18 determining your level of concern?

19 A Yes. Your heightened awareness for the dangerousness of the
20 area.

21 Q And you said that you placed the handcuffs on the defendant
22 for officer safety reasons. Were you intending to place him
23 under arrest at that point --

24 A No.

25 Q -- when you first put the cuffs on him?

1 A No. He was being detained.

2 Q And can you explain to us your motive then in terms of
3 officer safety and putting the handcuffs on him?

4 A I didn't want him having a chance --

5 MR. ROBINSON: Objection.

6 THE COURT: Basis?

7 MR. ROBINSON: It's not relevant, your Honor.

8 THE COURT: No. I disagree. It is relevant. Your
9 objection is overruled.

10 A I wanted to have him have a less chance of an opportunity to
11 grab that firearm, to use it against me or my partner or anybody
12 else.

13 BY MR. FLANNERY:

14 Q Now, when you first approached him, did you or Officer
15 Berrios draw your own weapon?

16 A No.

17 Q Did you ever do that at any point during this encounter?

18 A No.

19 Q And did you ever have the defendant lay on the ground for
20 any reason?

21 A No.

22 Q And so the pat frisk, that occurred when he was standing up?

23 A Correct.

24 MR. FLANNERY: I have nothing further.

25 THE COURT: All right. Cross?

1 MR. ROBINSON: Thank you, your Honor.

2 CROSS-EXAMINATION

3 BY MR. ROBINSON:

4 Q Good morning, Officer Sowers -- or good afternoon.

5 A Good morning.

6 Q I'm Attorney Thomas Robinson. I represent Ayyub Abdul-Alim.

7 I just have a few questions.

8 You were in a marked cruiser on December 9, 2011, when this
9 all occurred, is that correct?

10 A Yes.

11 Q Okay. You were wearing your uniform?

12 A Correct.

13 Q Duty belt?

14 A Yes.

15 Q Your badge?

16 A Yes.

17 Q Your firearm?

18 A Yes.

19 Q Okay. And you'd indicated earlier that you were conducting
20 an I.D. check of the gentleman in the white Jeep, is that
21 correct?

22 A Correct.

23 Q Okay. And you had information that that gentleman was the
24 target of a narcotics investigation, is that correct?

25 A Correct.

1 Q Okay. You did not have any information with respect to
2 Ayyub Abdul-Alim before you entered that parking lot, is that
3 correct?

4 A Correct.

5 Q Now, you received the information with respect to the
6 gentleman in white Jeep. That was transmitted to you over the
7 mobile data terminal, is that correct?

8 A Yes.

9 Q Okay. And that mobile data terminal, that's essentially a
10 laptop in your cruiser?

11 A Yes, it is.

12 Q Okay. And you can send and receive information on there?

13 A Yes.

14 Q Okay. And you also have the ability to do records checks
15 from that computer, is that correct?

16 A Yes.

17 Q Okay. And you performed a records check with respect to the
18 driver of the white Jeep?

19 A We did.

20 Q Okay. But you did not perform any records checks with
21 respect to any other individuals that night, is that correct?

22 A No.

23 Q Okay. So you did not perform any other records checks?

24 A We did.

25 Q You did perform other records checks?

1 A We did.

2 Q Okay. Who else did you perform a records check upon?

3 A Mr. Abdul-Alim.

4 Q And the record check that you performed on Mr. Abdul-Alim,
5 was that an I.D. check?

6 A No.

7 Q Was that an FID check?

8 A Correct.

9 Q Okay. So you checked to see if he had a license for a
10 firearm, is that correct?

11 A Correct.

12 Q So while you were conducting this I.D. check on the white
13 Jeep, you received a transmission with respect to a gentleman in
14 a red jacket, is that correct?

15 A Correct.

16 Q Okay. And after you received that, did you see an
17 individual in a red jacket?

18 A We did.

19 Q Okay. And how soon after you heard the transmission did you
20 see the person in the red jacket?

21 A Probably within a few seconds.

22 Q Okay. And how far away was the gentleman in the red jacket
23 from you?

24 A A few feet.

25 Q And did you have an opportunity to observe the gentleman in

1 the red jacket?

2 A Very quickly.

3 Q Okay. And did you say anything to that person?

4 A We did.

5 Q What did you say?

6 A We told him to put his hands up.

7 Q And what did he do?

8 A He did. He --

9 Q He complied?

10 A He did.

11 Q Okay. He didn't attempt to run away?

12 A No.

13 Q He didn't make any furtive gestures?

14 A No.

15 Q He didn't appear to be hiding anything at that time?

16 A No.

17 Q After you told him to put his hands up, you approached him,

18 is that correct?

19 A Correct.

20 Q And Officer Berrios, you testified he approached Mr.

21 Abdul-Alim, as well?

22 A Yes.

23 Q And you got on either side of him?

24 A We did.

25 Q And that was to control him, is that correct?

1 A Correct.

2 Q And then you put him into handcuffs?

3 A I did.

4 Q And then you brought him to the rear of the cruiser?

5 A No.

6 Q Okay. After he was in handcuffs, you then performed your
7 pat frisk, is that correct?

8 A I did.

9 Q Okay. And you've been trained in conducting pat frisks, is
10 that correct?

11 A Yes.

12 Q You were trained in that at the police academy?

13 A Yes.

14 Q And you've conducted how many pat frisks before December 9,
15 2011? Hundreds, thousands?

16 A Probably in the hundreds.

17 Q Okay. And when you conducted your pat frisk of Mr.
18 Abdul-Alim, you had information that he had a firearm on him, is
19 that correct?

20 A Correct.

21 Q And you didn't find anything when you conducted your pat
22 frisk, is that correct?

23 A Correct.

24 Q Okay. So after you conducted that pat frisk, you then took
25 Mr. Abdul-Alim and you put him into the cruiser, isn't that

1 correct?

2 A No.

3 Q In fact, you conducted two pat frisks of Mr. Abdul-Alim,
4 isn't that correct?

5 A I only did one.

6 Q Now, there was a police report in this case that was written
7 by Officer Sheehan, is that correct?

8 A Yes.

9 Q And before that police report was written, you had an
10 opportunity to talk to Officer Sheehan, isn't that correct?

11 A Yeah, we did.

12 Q Okay. And you discussed what happened that night?

13 A Yes.

14 Q Okay. And then after the police report was written, you've
15 had an opportunity to review it, isn't that correct?

16 A Correct.

17 Q Okay. Now, with respect to the police report, it doesn't
18 indicate in there that there was one search and nothing was
19 found, does it?

20 A No.

21 Q Now, you said before that -- you indicated before that there
22 was a second search that took place while Mr. Abdul-Alim was
23 inside of the cruiser, is that correct?

24 A No.

25 Q Okay. Was there more than one search conducted of Mr.

1 Abdul-Alim?

2 A Yes.

3 Q Okay. Where was the second search conducted?

4 A The same location from the first.

5 Q Okay. So both searches were conducted while Mr. Abdul-Alim
6 was outside of the cruiser, is that correct?

7 A Correct.

8 Q Okay. And the second search was conducted by Officer
9 Berrios, is that correct?

10 A Yes.

11 Q Okay. And you did not see Officer Berrios recover the
12 firearm, isn't that correct?

13 A No.

14 Q You did see him recover the firearm?

15 A I did.

16 Q And where were you standing when you saw that?

17 A Right next to Officer Berrios.

18 Q And you were standing right next to Officer Berrios outside
19 of the cruiser?

20 A Correct.

21 Q And Officer Berrios was outside of the cruiser?

22 A Correct.

23 Q And Mr. Ayyub Abdul-Alim was outside of the cruiser?

24 A Correct.

25 Q Okay. Now, you mentioned that you took possession of a

1 firearm -- or Officer Berrios took possession of a firearm. Did
2 he hand the firearm to you?

3 A I believe he did.

4 Q Okay. And was Officer Berrios wearing gloves at that time?

5 A I don't recall.

6 Q Were you wearing gloves?

7 A I don't recall.

8 Q Was it you who made the gun safe?

9 A I did.

10 Q Okay. After the first search, were you in contact with
11 Officer Sheehan? .

12 A Yes.

13 Q And so you were speaking to Officer Sheehan and he told you
14 to get -- essentially get away from Mr. Abdul-Alim?

15 A He did. ,

16 Q And did you comply with that request?

17 A I did.

18 Q So Mr. Abdul-Alim was standing near your cruiser at that
19 time, and then you walked away, is that correct?

20 A Yes.

21 Q Okay. And it was at that time that you received the
22 transmission that there was a firearm in Mr. Abdul-Alim's
23 underwear?

24 A Yes.

25 Q And if I could back up on that. With respect to the

1 gentleman in the white Jeep, the gentleman in the white Jeep, did
2 you learn the identity of that individual?

3 A I did.

4 Q And was that gentleman Abdul Latif Tangreti (phonetic)?

5 A I believe that was his name.

6 Q Okay. And did you talk with Mr. Tangreti (phonetic)?

7 A We did.

8 Q Okay. And so you got his identification information, is
9 that correct?

10 A We did.

11 Q And did you ask him to get out of the car?

12 A I believe we asked him to step out of the car.

13 Q And you conducted a search of him, is that correct?

14 A We did pat him down.

15 Q And did you search -- did you do a search of the vehicle?

16 A No.

17 MR. FLANNERY: Objection. Just relevance.

18 THE COURT: Overruled.

19 BY MR. ROBINSON:

20 Q Now, if I can just jump ahead for a moment. After the first
21 search of Mr. Abdul-Alim, did you at any point have contact with
22 Siham Stewart? Did she approach you? Did a woman approach you
23 at that point?

24 A A woman did.

25 Q And was that Siham Stewart?

1 A I don't remember.

2 Q Do you remember what the woman looked like?

3 A Vaguely.

4 Q Was she wearing a head scarf?

5 A I don't remember.

6 Q And do you recall having an interaction with that woman?

7 A No.

8 Q Do you recall if Officer Berrios had an interaction with
9 that woman?

10 A I don't recall.

11 Q Do you recall if Officer Sheehan had interaction with that
12 woman?

13 A Officer Sheehan was not on scene.

14 Q Okay. But Officer Sheehan did arrive at the scene
15 afterwards, is that correct, after you had taken Mr. Abdul-Alim
16 and put him in the cruiser?

17 A At some point he did.

18 Q And did you see him have contact with a woman at the scene
19 at that time?

20 A I don't recall.

21 MR. ROBINSON: If I could have a moment, your Honor?

22 THE COURT: You may.

23 MR. ROBINSON: I have nothing further, your Honor.

24 THE COURT: All right. Any redirect?

25 MR. FLANNERY: Just a few questions, your Honor.

1 THE COURT: All right.

2 REDIRECT EXAMINATION

3 BY MR. FLANNERY:

4 Q Just to clarify. How many times did you pat frisk the
5 defendant?

6 A Once.

7 Q And where was he when that occurred? Was he inside or
8 outside the cruiser?

9 A Outside the cruiser.

10 Q And how many times did Officer Berrios pat frisk the
11 defendant?

12 A Once.

13 Q And, again, was that inside or outside the cruiser?

14 A Outside.

15 Q And after that second pat frisk by Officer Berrios, did
16 Officer Berrios retrieve the gun in question?

17 A No.

18 Q Okay. And where did that retrieval occur?

19 A In the back of our cruiser.

20 Q Okay. And I think you testified, but just to clarify, did
21 you observe Officer Berrios retrieving the firearm from the
22 defendant in the back of the cruiser?

23 A Yes.

24 Q And you were outside the cruiser observing this?

25 A Yes.

1 Q All right. And you testified that you ran a check of the
2 defendant, a record check of the defendant. Was that after you
3 had discovered the firearm?

4 A Yes.

5 Q And was that something that you did because that's what you
6 do in every case like that?

7 A Yes.

8 MR. FLANNERY: I have nothing further.

9 THE COURT: All right. Any recross?

10 MR. ROBINSON: Very briefly, your Honor.

11 THE COURT: It's going to be limited to the scope of
12 redirect?

13 MR. ROBINSON: Yes, your Honor.

14 RECROSS EXAMINATION

15 BY MR. ROBINSON:

16 Q So when the gun was retrieved your testimony is that Mr.
17 Abdul-Alim was in the back of the cruiser, is that correct?

18 A Correct.

19 Q Okay. But that information, it was not contained in the
20 police report, is that correct?

21 A Correct.

22 Q Okay. And you also spoke to a gentleman from the Internal
23 Investigation Unit about this case?

24 A Yes.

25 Q And that was on June 25th of 2013?

1 A I don't remember the specific date.

2 Q Does that sound like the approximate time when you spoke
3 with that gentleman?

4 A I believe so.

5 Q Okay. And you made no mention of the fact that Mr.
6 Abdul-Alim was in the back of the cruiser at the time the firearm
7 was recovered, is that correct?

8 A I don't remember all of his questions.

9 Q If I were to show you a copy of your statement that you made
10 to him, would that refresh your recollection?

11 A Yes.

12 MR. ROBINSON: May I approach, your Honor?

13 THE COURT: You may. And could you also advise me of the
14 date of that statement again?

15 MR. ROBINSON: June 25, 2013.

16 THE COURT: Thank you.

17 BY MR. ROBINSON:

18 Q Can you take an opportunity to review that?

19 A Okay.

20 Q Is there anything in that statement which references the
21 recovery of the firearm in the back of the cruiser?

22 A No.

23 Q Okay. You indicated just now that you performed an FID
24 record check with respect to Mr. Abdul-Alim, is that correct?

25 A We did.

1 Q Okay. And that would be conducted through the Criminal
2 Justice Information System, is that correct?

3 A Yes.

4 Q Okay.

5 MR. ROBINSON: May I approach, your Honor?

6 THE COURT: You may.

7 BY MR. ROBINSON:

8 Q I have a record there from CJIS of all requests for
9 information on December 9, 2011, from you, Officer Sowers, from
10 Officer Berrios and Officer Sheehan. Could you indicate to me if
11 those records reflect that an FID check was conducted on Mr.
12 Abdul-Alim?

13 A Not on this page, no.

14 Q Could you check the other pages?

15 A No.

16 MR. ROBINSON: I have nothing further, your Honor.

17 THE COURT: All right. Thank you.

18 Thank you, Officer. You may step down.

19 THE WITNESS: Thank you, your Honor.

20 (Witness excused.)

21 MR. FLANNERY: The Commonwealth rests.

22 THE COURT: All right. Thank you.

23 MR. ROBINSON: If I could have one brief moment, your Honor?
24 I think we're going to rest, as well.

25 THE COURT: All right.

1 MR. ROBINSON: Yeah, we would rest, as well, your Honor.

2 THE COURT: All right.

3 MR. ROBINSON: Oh, I'm sorry. We would ask to submit into
4 evidence the copy of the Special Report to Police Commissioner
5 William Fitchet dated July 10, 2013, a copy of which was provided
6 to the Commonwealth. It is a lengthy report. I would be just
7 directing your Honor's attention to essentially two pages of the
8 report, Pages 22 and 23, which are the statements of Officers
9 Berrios and Sowers with respect to what occurred on the date of
10 the arrest, December 9, 2011.

11 THE COURT: And what do you --

12 Well, first of all, does the Commonwealth object?

13 MR. FLANNERY: Yes, your Honor.

14 THE COURT: All right. First tell me your objection.

15 MR. FLANNERY: The objection would be hearsay.

16 THE COURT: All right. So I have a hearsay objection.

17 Attorney Robinson, what do you say?

18 MR. ROBINSON: Well, your Honor, I'd be offering it with
19 respect to -- as impeachment, prior inconsistent statements with
20 respect to Officer Berrios, and also with respect to Officer
21 Sowers based upon the testimony that he provided today. And so I
22 would suggest to your Honor that prior inconsistent statements
23 are an exception to the hearsay rule.

24 THE COURT: What are the prior inconsistent statements
25 contained in their statements to Chief Fitchet?

1 MR. ROBINSON: So with respect to Officer Sowers, the
2 omission with respect to the firearm being recovered in the back
3 of the cruiser.

4 With respect to Officer Berrios, it would be he had
5 testified on the stand that my -- that Mr. Abdul-Alim was not
6 handcuffed until he was brought to the back of the cruiser and
7 then placed in handcuffs. In this statement he indicates that
8 Mr. Abdul-Alim -- I actually apologize. I think it's Officer
9 Sowers who indicates in his statement that Mr. Abdul-Alim is
10 handcuffed immediately thereafter.

11 There's also no indication that Mr. Abdul-Alim is in the
12 back of the cruiser. In fact, the implication is that the search
13 occurs outside of the cruiser and then, according to the
14 statement to Internal Investigation Unit, he indicates that after
15 the search Mr. Abdul-Alim is placed in the cruiser.

16 THE COURT: Who indicates that?

17 MR. ROBINSON: That would be Officer Berrios.

18 THE COURT: That was Officer Berrios's testimony. He
19 testified that the two pat frisks were conducted outside of the
20 cruiser and then the defendant was placed in the cruiser, I
21 believe.

22 MR. ROBINSON: Right.

23 THE COURT: You're telling me his statement is inconsistent
24 with that?

25 MR. ROBINSON: His statement is inconsistent in that it

1 indicates that they recover the firearm and then Mr. Abdul-Alim
2 is placed in the back of the cruiser, not that the firearm is
3 recovered while he's sitting in the back of the cruiser.

4 THE COURT: So in that statement he indicates -- in the
5 statement to Chief Fitchet he indicates that the firearm is
6 recovered outside of the cruiser, and then the defendant is
7 placed in the cruiser?

8 MR. ROBINSON: That's correct.

9 THE COURT: All right. So that's the first inconsistent
10 statement I've heard that hasn't already been testified to.
11 Okay? So, first of all, that's in Officer Berrios's statement?

12 MR. ROBINSON: That's correct.

13 THE COURT: And is there any dispute as to the authenticity
14 of this statement or that it's, in fact, signed by Officer
15 Berrios, Attorney Flannery?

16 MR. FLANNERY: I don't believe so. Which -- if --

17 MR. ROBINSON: It would be Page 22.

18 MR. FLANNERY: Well, I don't -- I don't dispute the
19 authenticity of this report. There's no signature on what I'm
20 looking at.

21 THE COURT: Is there any indication that it is, in fact, the
22 statement of Officer Berrios that he adopted? In other words, is
23 it -- does it purport to be something that he's electronically
24 signed or that he himself has submitted?

25 MR. FLANNERY: Yes, your Honor. It says -- at the end of

1 the statement it says, "Respectfully Submitted, Officer Angel
2 Berrios, Report Submitted."

3 THE COURT: All right.

4 MR. FLANNERY: So there is an indication that it's --- that
5 it was his statement.

6 THE COURT: All right. I'm going to permit just the two
7 statements to be admitted. How many pages are those?

8 MR. ROBINSON: Two pages. Well, I think it would be three
9 because the signature --

10 THE COURT: You have them in your hand.

11 MR. ROBINSON: I've got the entire document. Do you want me
12 to separate it out for your Honor?

13 THE COURT: Yeah.

14 MR. ROBINSON: Okay.

15 THE COURT: I just want the two statements. There may be
16 other material in there that would not relate to the testimony
17 given by the officers or they may not constitute a prior
18 inconsistent statement. I could ask you to narrow the statements
19 further, but I'm not going to require you to redact out other
20 information, unless there's something in there that you, Attorney
21 Flannery, think is confidential or privileged in some way.

22 MR. ROBINSON: Okay.

23 THE COURT: How many pages?

24 MR. ROBINSON: It is just two, your Honor. I thought that
25 his signature --

1 THE COURT: That's the combined -- or the statements of both
2 Officer Sowers and Officer Berrios?

3 MR. ROBINSON: That's correct.

4 THE COURT: All right.

5 MR. FLANNERY: Your Honor, I don't think there's any need to
6 redact the additional material.

7 THE COURT: Those statements will be admitted then.

8 MR. ROBINSON: May I approach?

9 CLERK DOLAHER: Exhibit 1, Counsel.

10 THE COURT: Is that the first exhibit?

11 MR. ROBINSON: I believe so.

12 THE COURT: I think it is.

13 (Excerpt of Special Report to Police Commissioner Fitchet dated
14 July 10, 2013, marked as Exhibit Number 1.)

15 MR. ROBINSON: Your Honor, I would also ask to introduce the
16 records check with respect to CJIS. It's not a major issue for
17 trial, but -- or, excuse me, for the motion to suppress, but I
18 would suggest it goes to credibility of the officers who all
19 testified that a records check was conducted. These are the
20 records of the officers, as well as dispatch, of any records
21 checks made that day.

22 THE COURT: Is there some certification on that document?

23 MR. ROBINSON: There is a letter -- cover letter from DCJIS
24 indicating what the records are.

25 THE COURT: All right. What does it indicate the records

1 are?

2 MR. ROBINSON: It says, "Dear Clerk: I am in receipt of a
3 court order for all inquiries run within Massachusetts Criminal
4 Justice Information System by Anthony Sowers, Angel Berrios,
5 Ronald Sheehan, and Amanda Provost of the Springfield Police
6 Department on December 9, 2011, between 5 p.m. and 9 p.m."

7 THE COURT: All right.

8 MR. FLANNERY: Your Honor, I would object again on hearsay
9 grounds, relevance grounds. I just received this. I'm still
10 trying to even decipher what it means in the layout here.

11 I think Officer Sheehan testified about running a record
12 check, but that wouldn't have been on that day. That would have
13 been at some point earlier.

14 THE COURT: Officer Sowers did testify that --

15 MR. FLANNERY: Officer Sowers did testify that he ran a
16 check that day and he was confronted with this, and I think he
17 testified that, according to this record, that check didn't
18 happen.

19 THE COURT: All right. That will be admitted as Exhibit 2.

20 MR. ROBINSON: Thank you, your Honor.

21 (CJIS report dated December 9, 2011, marked as Exhibit Number 2.)

22 THE COURT: Anything further, Attorney Robinson?

23 MR. ROBINSON: No, your Honor. At this time the defense
24 would rest with respect to evidence.

25 THE COURT: All right. Very good. Did you wish to be

1 heard?

2 MR. ROBINSON: Yeah, I do, your Honor.

3 THE COURT: Why don't you have a seat, Attorney Flannery,
4 and we'll hear from --

5 MR. FLANNERY: Yes, your Honor.

6 THE COURT: -- Attorney Robinson.

7 MR. ROBINSON: As a preliminary matter, I would request the
8 Court -- I would be making an oral motion for a transcript of
9 this motion to suppress proceeding and I would make a request to
10 the Court that I be permitted to submit a memorandum of law with
11 respect to this motion to suppress and be permitted to obtain the
12 transcript and cite to the record for the purposes of making my
13 argument.

14 The reason for that, your Honor, is that credibility with
15 respect to the various witnesses would be one of the primary
16 arguments that we'd be making with respect to this motion and the
17 various conflicting testimony between the various witnesses, and
18 then with respect to their various previous statements would be
19 key to that argument. I would suggest that citation for the
20 record would be appropriate, given what we've heard. So I would
21 be making that request.

22 THE COURT: All right. So --

23 MR. ROBINSON: But I am --

24 THE COURT: So, first of all, I'll address the two requests.
25 Your request that the hearing be transcribed and that you receive

1 a copy of it is allowed.

2 MR. ROBINSON: Thank you, your Honor.

3 THE COURT: But your request that you be permitted to submit
4 a supplemental memorandum at some later date so that you can
5 address principally issues of credibility and inconsistencies in
6 the testimony of the various witnesses is denied. And I'll tell
7 you why it's denied. It's because I've taken very careful notes
8 of this hearing as the testimony came in, specifically 19 pages
9 of notes. I had the opportunity to listen to the testimony that
10 was presented on November 21st over the weekend to make sure that
11 my notes were both accurate and to supplement those, and I did
12 those. So I know what the testimony was of each of the witnesses
13 and I'm able to on my own determine where there were
14 inconsistencies and if they were material. All right?

15 MR. ROBINSON: Yes, your Honor.

16 THE COURT: And this case is scheduled for trial on
17 December 12th.

18 MR. ROBINSON: That's correct, your Honor.

19 THE COURT: It's my intention to render a decision within
20 the next several days, and so I don't need your assistance in
21 regard to those inconsistencies. But I wanted you to understand
22 that. It's not that what you're telling me is unimportant; it's
23 that I already have a handle on it. I'm able to discern those
24 things and to make findings of fact, which I expect will be done
25 within the next seven days.

1 So I'll hear you. I'll hear your argument.

2 MR. ROBINSON: Yes, your Honor.

3 CLOSING ARGUMENT FOR THE DEFENDANT

4 MR. ROBINSON: Essentially, the Commonwealth had the burden
5 of showing that this search and seizure of my client was legal,
6 and I would suggest to the Court that they're going to be unable
7 to meet their burden of showing that the police had probable
8 cause to conduct their seizure, their arrest of my client, and
9 the search.

10 I would first direct your Honor's attention to the sequence
11 of events at which my client was taken -- during which my client
12 was taken into custody. The officers received a report from
13 Officer Sheehan with respect to a gentleman in a red jacket. I
14 believe your Honor heard the recording that there was supposedly
15 a gun. The information relayed was that there was a gun in his
16 waistband.

17 Based upon that information, you heard the officers testify
18 that they approached Mr. Abdul-Alim on either side. They took
19 control of his hands, and then at least Officer Sowers testified
20 that he was then placed immediately into handcuffs. Under the
21 Mendenhall standard, your Honor, essentially someone is under
22 arrest at the moment that a reasonable person under the
23 circumstances would feel that they are under arrest. And I would
24 suggest any normal person under those circumstances when they've
25 had two officers approach them on either side, take control of

1 their body, take control of their arms, their hands, and then put
2 them in handcuffs, anybody in that circumstance would feel
3 they're under arrest.

4 And so at that moment the police needed probable cause in
5 order to do what they did. And I would suggest that they did
6 not --

7 THE COURT: Well, I'll agree with you that there is little
8 issue with respect to whether or not the detention of your client
9 on December 9, 2011, at the time that the police officers placed
10 their hands on him and conducted a pat frisk was a stop. I
11 disagree with you that probable cause was required.

12 MR. ROBINSON: Okay, your Honor. Well, if --

13 THE COURT: In other words, what I'm saying is, based on the
14 testimony I've heard, it seems as though it was a Terry stop,
15 and, in fact, the witnesses indicated that they didn't consider
16 that Mr. Abdul-Alim was under arrest at that moment. So that's
17 why I'm interjecting that, to direct your argument, if you will.

18 MR. ROBINSON: I would suggest, your Honor, that the
19 officers' subjective intent is not relevant to this inquiry.

20 THE COURT: It is not.

21 MR. ROBINSON: The objective -- the objective standard is
22 when a reasonable person under the circumstances --

23 THE COURT: To determine whether there's a stop. In this
24 case -- I can cite you to some case law, *Commonwealth v. Gomes*,
25 453 Mass. 506, 2009, the touching of a person in the conducting

1 of a pat frisk constitutes a stop. My only suggestion to you is
2 that you can have a stop without -- and conduct a pat frisk
3 without having to have probable cause. All that's required is a
4 reasonable suspicion.

5 MR. ROBINSON: I wouldn't disagree with that, your Honor,
6 but in this case we had testimony that my client was placed in
7 handcuffs and then pat frisked. And I would suggest that under
8 those circumstances when he's placed into handcuffs, at that
9 point essentially an arrest had taken place.

10 THE COURT: All right. But you know there's some case law
11 that says in conducting a Terry stop a person can be handcuffed,
12 in fact, a person can be placed in a cruiser, do you not?

13 MR. ROBINSON: I wouldn't dispute that, your Honor.

14 THE COURT: All right.

15 MR. ROBINSON: I would just suggest that, under these
16 circumstances, the detention, all of the -- you heard that the
17 officers -- there was a marked cruiser on the scene, that the
18 officers were in full uniform with badges, guns, duty belts, all
19 of that, together with the fact that my client was immediately
20 grabbed, as the officers testified to -- you can hear from the
21 recording Officer Sheehan 'orders them to grab him. They do grab
22 him.

23 THE COURT: Right.

24 MR. ROBINSON: They control his movements.

25 THE COURT: Right.

1 MR. ROBINSON: They put handcuffs on him, they conduct a pat
2 frisk, and he's detained for a period of time. I would suggest
3 all of those things, all of those circumstances together, raise
4 this to the level of an arrest and that probable cause was
5 necessary.

6 THE COURT: All right. I heard your argument and you have
7 heard my comments.

8 MR. ROBINSON: Yes, yes.

9 THE COURT: So go ahead.

10 MR. ROBINSON: So in looking at the information that was at
11 the disposal of the police officers, I would suggest to you that
12 the information that the police had did not provide probable
13 cause for the -- for the stop and the seizure that took place.

14 Essentially what you have is a tip from an individual. Now,
15 this is an individual who is a now named informant, so,
16 obviously, it's in a slightly different position than the
17 circumstances where you have a confidential informant, but I
18 think even in the situation where there's a named informant your
19 Honor has to analyze the information through the Aguilar-Spinelli
20 two-pronged test examining both the veracity of the informant, as
21 well as the basis of knowledge of that informant with respect to
22 the information that was given.

23 Based on the testimony you heard today, I would suggest to
24 you that the veracity of that informant -- or, excuse me -- the
25 testimony that you heard last week, the veracity of that.

1 informant is very much in question. You heard testimony that she
2 received a number of payments. Your Honor can consider that when
3 considering her veracity. You also heard information that she
4 was in the process of applying for citizenship, that she had
5 family members that were in the process of applying for --

6 THE COURT: May I interject something here?

7 MR. ROBINSON: Yes.

8 THE COURT: I mean I'll let you continue on in that vein if
9 you wish to. Do you want me to give you some guidance as to what
10 I think is important or do you not?

11 MR. ROBINSON: Yes, absolutely, your Honor.

12 THE COURT: Okay. What you're arguing now is credibility of
13 the witness. The payments came after she had begun to provide
14 information with respect to your client. The issue -- but it's
15 not -- the veracity issue isn't the credibility of the witness;
16 it's what was known to the officers on December 9, 2011, that
17 would give rise to them to rely on what she told them.

18 Now, you're saying they needed probable cause. I'm telling
19 you they needed a reasonable suspicion. You're correct that the
20 Aguilar-Spinelli test is applicable in both situations, but it's
21 a more relaxed standard, if you will, with respect to a Terry
22 stop, which is what I've determined occurred here. Okay?

23 MR. ROBINSON: Yes, your Honor.

24 THE COURT: But the -- you know, the credibility of Ms.
25 Stewart is important only if there is some question in my mind as

1 a fact finder. Did she, in fact, speak to Officer Sheehan in
2 advance of that date? Did she, in fact, tell Officer Sheehan
3 that she had some concerns about her own well-being and that of
4 her child? Did she tell the officer that Mr. Abdul-Alim had a
5 gun? Did she show him a picture of the gun? Did she call him on
6 the evening of December 9th? Did she call him again or speak to
7 him further and relate that Mr. Abdul-Alim had a gun on his
8 person?

9 If you're suggesting to me that I should disbelieve any of
10 those details, then pursue what you're telling me.

11 MR. ROBINSON: Yes, your Honor. That's exactly --

12 THE COURT: Are you telling me that?

13 MR. ROBINSON: Yes, your Honor.

14 THE COURT: All right.

15 MR. ROBINSON: I would suggest that the information that
16 came to light in the hearing would go directly to her
17 reliability.

18 In addition to that, your Honor, you also heard her testify
19 that she had never previously provided any information to law
20 enforcement, which would also go to the Court's analysis of her
21 reliability or veracity with respect to the information that she
22 provided.

23 Now, jumping to the basis of knowledge prong, Officer
24 Sheehan testified that he had no information with respect to how
25 Ms. Stewart knew that Mr. Abdul-Alim had the firearm, and he

1 testified that to himself. So I'd suggest that there was very
2 strong testimony to indicate that the informant did not have a
3 basis of knowledge with respect to Mr. Abdul-Alim carrying a
4 firearm at that particular time.

5 THE COURT: All right.

6 MR. ROBINSON: On that basis I would suggest that the
7 information was not particularly reliable and should not justify
8 the conduct of the police officers at that time.

9 Now, in addition to that, your Honor, I would call your
10 attention to the sequence of events that you get from the
11 recording of the turret tapes and, as well, the observations of
12 Ms. Stewart.

13 What she testified to was that she observes Mr. Abdul-Alim
14 walking down the street. She observes the police officers take
15 control of him. She observes them conduct a search and find
16 nothing. And then she observes them put Mr. Abdul-Alim into the
17 cruiser and he's there for a period of time.

18 She then calls Officer Sheehan to give him more information.
19 And it is only after Officer Sheehan would have then relayed that
20 information to Officers Sowers and Berrios that she then reports
21 seeing Mr. Abdul-Alim taken out of the cruiser and searched
22 again, and then she claims at that time the firearm is recovered.

23 THE COURT: That testimony by Ms. Stewart you want me to
24 believe?

25 MR. ROBINSON: I do want you to credit that testimony. The

1 reason I want you to credit that testimony is that it most
2 closely matches what is in that recording, the turret tape
3 recording, and the information that the police officers provided,
4 their version of the events I would suggest to you is
5 inconsistent with respect to the various officers and their --
6 well, in particular Sowers and Berrios, their account of what
7 happened.

8 As I pointed out, Officer Berrios says no handcuffs, and
9 then Officer Sowers indicates that there were handcuffs placed
10 immediately on Mr. Abdul-Alim.

11 But, in addition to that, you heard from both of them that
12 in their police report there is no mention of two searches.
13 There's only the one search indicated in the police report. In
14 fact, Officer Sheehan, the author of the report, also
15 acknowledged that, that that information was simply missing from
16 the police report.

17 And so you have a series of statements from the officers.
18 They're inconsistent with one another. They're inconsistent with
19 their prior statements. They're inconsistent with their
20 statements with respect to the police report, with respect to the
21 Internal Investigation Unit records and the interviews that they
22 had provided there.

23 So your Honor's in the difficult position of determining
24 what to credit. And I would suggest to you that Ms. Stewart's
25 version of the events most closely matches what your Honor can

1 hear in those turret tape recordings.

2 Furthermore, you heard testimony that there was only a short
3 period of time between the point where --

4 THE COURT: Let me interrupt you just for a moment.

5 What then am I to make from the broadcast and the inquiry,
6 "Is the defendant in earshot?"

7 MR. ROBINSON: So at that point -- well, if you could
8 clarify. What are you -- what is your implication?

9 THE COURT: So Sowers says, "We have that guy."

10 Sheehan asks, "Is there a weapon on him?"

11 Sowers responds, "There's no weapon."

12 And then Sheehan makes an inquiry shortly thereafter, "Is
13 the defendant in earshot," and directs either Sowers and/or
14 Berrios to step away.

15 What am I to make of that?

16 MR. ROBINSON: There are some -- there are some delays in
17 that recording. He simply doesn't want that information,
18 obviously, relayed to Mr. Abdul-Alim. They step away. And so
19 they're -- I would suggest to your Honor that that reflects a
20 period of time when Mr. Abdul-Alim is in the back of the cruiser.

21 THE COURT: Your client urgently wants you to see something
22 there.

23 MR. ROBINSON: So, essentially, your Honor, given all of the
24 conflicting accounts, I would suggest that Ms. Stewart's account
25 of what she sees out the window as she observes everything going

1 on should be the version of the events that you credit in this
2 case. And --

3 THE COURT: Let's assume for a moment I credit this version
4 of events, that the officers, upon receiving a radio transmission
5 from Officer Sheehan, stop the defendant. They each grab an arm.
6 They conduct -- they, meaning Officer Sowers, conducts a pat
7 frisk. Nothing is found. Mr. Abdul-Alim is placed in the
8 cruiser, either in handcuffs or not in handcuffs, and then
9 there's a further transmission. They remove your client from the
10 cruiser, conduct a further pat frisk, feel a gun, place him back
11 in the cruiser and remove the gun.

12 MR. ROBINSON: At the moment that Officer Sowers conducts a
13 pat frisk and doesn't find any weapons, my client should have
14 been freed. The police officers testified that there was two
15 searches here. And I would suggest to the Court that at the
16 moment that pat frisk was conducted, at that point my client
17 should have been released, unless they had more information. But
18 there's a delay there. And the delay was testified to by Ms.
19 Stewart. She testified that she observed things happening. She
20 had to get on the phone. She had to call Officer Sheehan. That
21 information had to go from her to Officer Sheehan. It had to go
22 from Officer Sheehan over to Officers Sowers and Berrios. There
23 had to be a radio exchange. There was a lapse of time there
24 where officers had to move away from Mr. Abdul-Alim, and then a
25 message was relayed about another area to search.

1 And for all of that period of detention my client should
2 have been released. The police needed for that period of
3 detention something more than what they had at that time when
4 they conducted the pat frisk. They could have made an inquiry,
5 for example, of Mr. Abdul-Alim at that point once they did the
6 pat frisk. Sir, do you have anything on you? There was no
7 testimony to that effect. They made no effort to make any type
8 of inquiry. They simply detained him. And that detention was
9 illegal. It violated my client's Fourth Amendment rights and his
10 rights under the Massachusetts Declaration of Rights.

11 And for that reason your Honor should suppress the evidence
12 in this case, the firearm that was seized from his person.

13 THE COURT: All right. Anything further?

14 MR. ROBINSON: If I could have one moment, your Honor?

15 THE COURT: Sure.

16 MR. ROBINSON: Your Honor, in terms of getting back to the
17 sort of credibility, my client had a couple of points that he
18 wanted me to raise.

19 One was that with respect to the information that was
20 relayed to the police officers, you can hear from the recording
21 the information that's relayed to the police officers is there's
22 a gun in his waistband. In fact, a pat search is conducted and
23 nothing is found in that area, which, again, would go to the
24 veracity of the informant, but would also go to this analysis of
25 whether or not the subsequent detention of my client was

1 reasonable.

2 They had information. The information that they had did not
3 appear to pan out. So at that time my client should have been
4 freed.

5 My client also wanted to point out that with respect to the
6 various calls that were testified to, Officer Sheehan had
7 testified that -- when he was on the stand that he had received a
8 call from Ms. Stewart earlier in the day or earlier in the
9 evening and then another call once they were on the scene, once
10 he was there to make observations about what happened.

11 Ms. Stewart testified that the first time that she called
12 was immediately after Mr. Abdul-Alim left the apartment and was
13 making his way downstairs moments before -- or minutes before the
14 arrest. So there's another inconsistency.

15 THE COURT: Actually, that's a little inaccurate, but you
16 have to listen closely to her entire testimony, which was
17 difficult to follow and somewhat inconsistent, but having had the
18 opportunity, she does indicate that she made an initial call and
19 that it was almost -- that some minutes passed before she saw the
20 defendant emerge from the building, and she even made a reference
21 to his apartment, which I didn't know if I should infer from that
22 that in addition to the apartment he shared with her he had
23 another location in the building. I didn't quite know what to
24 make of that. But she did indicate that some time elapsed from
25 the time that she made the call before she saw the defendant

1 emerge from the building.

2 MR. ROBINSON: My recollection was she said it was a few
3 minutes.

4 THE COURT: Actually, my recollection is she said a couple
5 minutes, which is --

6 MR. ROBINSON: Okay.

7 THE COURT: -- which was interesting because Officer Sheehan
8 said it took him four minutes from the time that he got the call
9 to travel to the area. But I hear your point. I don't know that
10 it goes to credibility or veracity. It may just go to perception
11 of time.

12 MR. ROBINSON: Yes, your Honor.

13 THE COURT: All right. Anything further?

14 MR. ROBINSON: No, your Honor.

15 THE COURT: All right. Attorney Flannery?

16 MR. FLANNERY: Your Honor, just briefly.

17 CLOSING ARGUMENT FOR THE COMMONWEALTH

18 MR. FLANNERY: I would suggest that this was a Terry stop.
19 It was not transformed into an arrest because the defendant was
20 placed in handcuffs or into the cruiser.

21 There was some differing accounts, but I think even if you
22 view the evidence in the light that's most favorable to him, in
23 other words, that he was handcuffed right away, that he was put
24 in the cruiser right away, again, I think whether this Terry stop
25 is transformed into an arrest really turns on the question of

1 officer safety.

2 THE COURT: By the way, just for clarification, the
3 hypothetical factual scenario that I related to Mr. Robinson does
4 not reflect necessarily my findings of fact. I'm going to,
5 again, review the recording and my notes. But I just wanted to
6 make that clear.

7 MR. FLANNERY: I understand, your Honor, and I didn't intend
8 to imply that. I'm just simply --

9 THE COURT: No. I didn't think you did. You might disagree
10 with it, but I just wanted to make that clear.

11 MR. FLANNERY: My point, your Honor, is that even if that is
12 how it happened or that's the most credible version of events, I
13 think it still -- it still qualifies as a Terry stop, again
14 because of the officer safety concerns that this situation gave
15 rise to.

16 And the Court's already made reference to a number of cases.
17 I would simply ask the Court to also look at *Commonwealth v.*
18 *Willis*, which is 415 Mass. 814. And in that case --

19 THE COURT: I'm sorry. 415 Mass. 8 --

20 MR. FLANNERY: 814.

21 THE COURT: 814. Thank you.

22 MR. FLANNERY: That case deals with a similar set of facts,
23 although instead of handcuffing the defendant, putting him in a
24 cruiser, the police actually drew their guns and I believe made
25 the defendant lay on the floor, and that was based on a tip that

1 had less detail than this one.

2 And in this case we have a situation that's unfolding
3 rapidly and things are not going the way Officer Sheehan had
4 planned. He had asked for the assistance of these two other
5 officers so as to ascertain the identity of somebody who was in
6 the Jeep parked in that gas station. I believe he testified that
7 he didn't want them to do that at that location. And, in any
8 event, he didn't realize that the defendant would be walking
9 towards them as they were doing it. And I think that -- or I
10 would suggest that that heightened his sense of urgency and
11 concern.

12 He has the defendant walking towards the officers who are
13 investigating someone that he believes may be working with the
14 defendant and knowing that the defendant is armed. The tip that
15 we're talking about here is not an anonymous tip. This is a
16 known source. Officer Sheehan testified that he met Ms. Stewart
17 I believe a month or so before the events of this evening, that
18 he met with her on at least one occasion in person, that he spoke
19 to her some additional times.

20 The gun in question was one that he had seen a picture of.
21 She had made reference to that on a number of occasions.

22 THE COURT: He assumed it was.

23 MR. FLANNERY: Yes. I think -- yes, your Honor. And I
24 would suggest that that was a reasonable assumption, given the
25 subject of the conversation.

1 He also did his own check on the defendant. He ran an
2 in-state and an out-of-state record. I believe he testified that
3 from that he learned that the defendant had a conviction, an
4 in-state conviction for a serious drug offense and an
5 out-of-state conviction for a prior firearm offense.

6 So if you take all that into consideration and you add to it
7 how the sequence of events played out, I don't think Officer
8 Sheehan, to his credit, testified that Ms. Stewart had told him
9 directly that she was at the apartment, that she was with the
10 defendant and had seen him take the firearm. I believe Ms.
11 Stewart testified to that. But all of those would have been
12 reasonable inferences based on where he was and how the events
13 were unfolding.

14 And so, your Honor, I would suggest that really for officer
15 safety reasons there was little else that he could have done but
16 alert the two officers at the scene to apprehend the defendant as
17 he approached them. And his knowledge is imputed to them.

18 Now, the first pat frisk, there's no dispute about this, did
19 not yield either a weapon or even the sense that the defendant
20 was armed. But the defendant was not detained for a lengthy
21 period of time. It was -- he was only detained long enough so
22 that the police could communicate with Officer Sheehan who seemed
23 to have all the pertinent information. Officer Sheehan was --

24 THE COURT: One moment.

25 MR. FLANNERY: Yes.

1 THE COURT: And here comes -- here's the rub. If I accept
2 what Attorney Robinson is arguing and I accept what you've argued
3 to this point, then perhaps the police could rely on what Ms.
4 Stewart told them to suffice for a reasonable suspicion to
5 conduct a search, a pat frisk, not a full search, but a pat frisk
6 of the outer clothing for the safety of officers and other people
7 in the area.

8 Mr. Robinson's point is that after the -- after Officer
9 Sowers conducts the pat frisk and nothing is found and they
10 continue to detain Abdul-Alim, does that convert this to an
11 arrest and is there then a need for probable cause for his
12 further detention?

13 MR. FLANNERY: First I would suggest that it does not. And,
14 again, it's case by case, but I would suggest under these
15 circumstances, the brief additional detention --

16 THE COURT: Mr. Robinson says it wasn't that brief.
17 According to the testimony, I could infer that after the pat
18 frisk, that if I credit Ms. Stewart's recollection of events,
19 which on one hand Mr. Robinson wants me to do and on another he
20 doesn't, but if I were to credit that and consider that the
21 turret tapes and the logic that she made another call because she
22 saw the defendant placed in the cruiser, then I could find, if I
23 credited all of that, that the defendant was placed in the
24 cruiser and there was some -- at least some lapse of some seconds
25 while Ms. Stewart called Officer Sheehan, that Officer Sheehan

1 then heard what she had to say, directed the officers to step
2 away from the defendant wherever he was, presumably at that point
3 in the cruiser, had further conversation with one or both of
4 them, told them to conduct -- to check his underwear. He was
5 then taken out of the cruiser and searched again.

6 So my question to you is on that scenario, which is the
7 scenario the defendant would have me find, was there a need for
8 something greater than reasonable suspicion? Had it been
9 converted to an arrest? Was that a lawful arrest?

10 MR. FLANNERY: Again, your Honor, I would suggest that even
11 under -- even under that version of the facts here, the time
12 frame is still relatively short. I think Officer Sowers
13 testified that between the first pat frisk and when the gun was
14 ultimately retrieved, it was perhaps a minute or two, and I think
15 that's consistent with what we heard on the tape. And I think
16 it's just -- in terms of common sense and what the witnesses have
17 testified to as to what happened between those two points, I
18 think it makes sense.

19 Your Honor, again, the officers at the scene, they don't
20 have the benefit of the information that is coming from Officer
21 Sheehan. And the pat frisk that Officer Sowers conducts is just
22 that. It is a frisk, a pat-down of the outer clothing. It's not
23 infallible. So when they're getting information from Officer
24 Sheehan that doesn't comport with what they're -- this initial
25 frisk tells them, I think it's certainly appropriate, makes sense

1 for them to step back, contact Officer Sheehan, see if there's
2 been some mistake, see if there's more specific information about
3 where this gun is located that would explain why it was missed
4 during the first frisk and to keep the defendant where he is,
5 assuming he's in cuffs and even in the back of the cruiser, while
6 they do this, because it's not going to take that much time.

7 And, again, your Honor, there's also the backdrop of this
8 area, and all the witnesses testified about their experience,
9 about their knowledge of this area prior to December, 2011, and I
10 think it is fair to call it, based on that testimony, a
11 high-crime area. And that also, I would suggest, all goes to
12 their level of concern for their safety and for the safety of
13 others.

14 And, although the initial pat frisk cuts against that to
15 some degree, I think what they did by making those brief further
16 inquiries was appropriate and made sense under the circumstances
17 based on those very legitimate concerns.

18 THE COURT: All right. Anything further?

19 MR. FLANNERY: No, your Honor.

20 THE COURT: All right.

21 MR. ROBINSON: Your Honor, if I may?

22 THE COURT: You're asking to argue further?

23 MR. ROBINSON: No, no. I would renew my request with
24 respect to memorandum, the ability to cite to the record. Given
25 where your Honor's going with this --

1 THE COURT: I don't need you to cite to the record.

2 MR. ROBINSON: Okay.

3 THE COURT: If you want a few days to file a supplemental
4 memorandum, I will permit you. I will give each side three days,
5 I mean by this -- well, today's Monday. I'll give each side --
6 but, then again, Thursday's a holiday.

7 Are either of you gentlemen working on Friday?

8 MR. ROBINSON: No, your Honor. I didn't plan on it.

9 THE COURT: You're traveling, in fact?

10 MR. ROBINSON: I'm traveling this evening, your Honor.

11 THE COURT: All right. I'll give you till next Wednesday to
12 file a memorandum, either side.

13 MR. ROBINSON: Thank you, your Honor.

14 THE COURT: But, again, if you want to invest time in citing
15 to the facts and how I should construe them, you can do that, but
16 I have to tell you that my notes are pretty detailed and copious.
17 I don't need you to, but that's up to you. Your time might be
18 better spent focusing on what I've defined as a fairly narrow
19 issue, and that is if I accepted the scenario that the defendant
20 was initially pat frisked, nothing was found, he was further
21 detained, be it in the car or outside of the car, additional
22 information was gathered and there was a second search, what, if
23 anything, is the significance of that.

24 MR. ROBINSON: Yes, your Honor.

25 THE COURT: So you'll have to December 4th. Is that

1 agreeable?

2 MR. ROBINSON: That's agreeable, your Honor.

3 MR. FLANNERY: Yes, your Honor.

4 THE COURT: I'd keep it brief. I'm already fairly familiar
5 with the law on these issues, too. Okay?

6 MR. ROBINSON: Yes, your Honor.

7 THE COURT: Did you want till December 4th, as well,
8 Attorney Flannery?

9 MR. FLANNERY: Yes, your Honor. I don't know that I'll be
10 filing a brief --

11 THE COURT: All right.

12 MR. FLANNERY: -- but that's an acceptable time frame.
13 Thank you.

14 THE COURT: As of 4:30 on December 4th, if nothing's filed,
15 then I'm going to go ahead and issue a decision, and, given the
16 trial date, I expect that you'll have my decision then by
17 December -- by the end of the day on that Friday, December 6th.
18 Okay?

19 MR. FLANNERY: Thank you.

20 THE COURT: All right. Thank you both. You both did a nice
21 job.

22 MR. ROBINSON: Thank you, your Honor.

23 MR. FLANNERY: Thank you.

24 (Court adjourned at 1:11 p.m.)

25